Supreme Court, U.S.
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No. 96-51 (3)

IN THE
Supreme Court Of The United States
October Term, 1995

GUY AND BONNIE L. ADAMS, *et. al.*,
ON THEIR OWN BEHALF AND AS CLASS REPRESENTATIVES OF
ALL OTHER PERSONS SIMILARLY SITUATED,

Petitioners,

v.

BURLINGTON NORTHERN RAILROAD COMPANY
AND BURLINGTON NORTHERN INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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Question Presented

In 1933, Congress rendered contractual obligations that require payment in gold coins unenforceable, *see* H.R.J. Res. 192, 73d Cong., 1st Sess., 48 Stat. 112, 113 (1933) (formerly codified at 31 U.S.C. § 463), but subsequently removed that prohibition for obligations issued after October 27, 1977, *see* Pub. L. No. 95-147, 91 Stat. 1227, 1229 (1977) (formerly codified at 31 U.S.C. § 463). The question presented is: Whether the court of appeals correctly held that gold clauses in bonds issued almost a century ago are unenforceable under the 1933 statute as amended in 1977.

Statement Pursuant to Rule 29.6

Respondent Burlington Northern Inc. ("BNI") is a wholly owned subsidiary of Burlington Northern Santa Fe Corporation, which is a publicly held company having no parent company. Respondent Burlington Northern Railroad Company (the "Railroad") is BNI's wholly owned subsidiary. BNI has no nonwholly owned subsidiaries. The following are nonwholly owned subsidiaries of the Railroad: The Belt Railway Company of Chicago; Camas Prairie Railroad Company; Houston Belt & Terminal Railway Company; Iowa Transfer Railway Company; Kansas City Terminal Railway Company; Longview Switching Company; M T Properties, Inc.; Paducah & Illinois Railroad Company; Portland Terminal Railroad Company; Terminal Railroad Association of St. Louis; TTX Company; and The Wichita Union Terminal Railway Company.

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Opinions Below

The opinion of the court of appeals (Pet. App. 1a) is reported at 80 F.3d 1377. The decision of the district court was rendered orally from the bench on April 11, 1994. The judgment of the district court (Pet. App. 17a) was entered on the same day.

Jurisdiction

The judgment of the court of appeals was entered on April 10, 1996. The petition for a writ of *certiorari* was filed on July 9, 1996. This Court's jurisdiction is invoked under 28 U.S.C. § 1254 (1994).

Statutes or Other Provisions Involved

The statutory provisions at issue are: H.R.J. Res. 192, 73d Cong., 1st Sess., 48 Stat. 112, 113 (1933) (formerly codified at 31 U.S.C. § 463), reprinted at Pet. App. 51a; Pub. L. No. 95-147, 91 Stat. 1227, 1229 (1977) (formerly codified at 31 U.S.C. § 463), reprinted at Pet. App. 62a; and 31 U.S.C. § 5118(d)(2) (1994), reprinted at Pet. App. 71a.

The constitutional provisions at issue are: U.S. Const. art. I, § 8, cl. 3; and U.S. Const. art I, § 8, cl. 5.

Statement of the Case

A. Introduction.

This is an action to enforce gold clauses in bonds issued nearly a century ago by the Northern Pacific Railway Company ("Northern Pacific") and the Great Northern Railway Company ("Great Northern") pursuant to 1896 and 1921 indentures. Approximately 125 bondholders ("Petitioners" or "Bondholders") filed this action on November 15, 1993, against Burlington Northern Railroad Company (the "Railroad")—which inherited obligor status on the bonds when Northern Pacific and Great Northern merged

into it in 1970—and its corporate parent, Burlington Northern Inc. (collectively, "Burlington").

Although Congress rendered gold clauses in obligations issued before 1977 unenforceable, 31 U.S.C. § 5118(d)(2) (1994), Petitioners claim they are contractually entitled to payment of principal and interest in gold. On April 11, 1994, the United States District Court for the Western District of Washington granted Burlington's motion to dismiss or, in the alternative, for summary judgment. On April 10, 1996, the United States Court of Appeals for the Ninth Circuit unanimously affirmed the ruling of the district court.[1]

B. The Bonds At Issue.

Four bond issues are the subject of this action: the 1945 and 1946 Great Northern issues and two 1896 Northern Pacific issues (the "Bonds"). Each of the issues and their respective indentures contains a "gold clause". For example, the Northern Pacific bonds call for payment of "[a certain amount of] Dollars, gold coin of the United States of America of the present [*i.e.*, 1896 or 1921] standard of weight and fineness". Pet. App. 4a. Approximately $92 million of the Northern Pacific bonds and approximately $62 million of the Great Northern bonds were outstanding at the time of the district court proceeding. *Id.* 4a.-5a. Each bond issue trades on the New York Stock Exchange at prices reflecting the market's belief that the bonds will be paid in current legal tender, not gold coin or its equivalent. *Id.* 5a. If the method of payment were to return to gold coin, the value of the bonds would skyrocket to approximately $2.7 billion in principal alone, which is an increase of 2,000 percent. *Id.*

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[1] The Ninth Circuit consolidated the Bondholders' appeal with a similar appeal, *Adams v. CSX Transp., Inc.*, No. 94-35618 (9th Cir. filed June 22, 1994). The opinion rendered covered both cases. The appellants in *Adams v. CSX Transp., Inc.* filed a petition for rehearing en banc, which was denied by the Ninth Circuit on June 24, 1996.

C. The Statutory Background.

Before President Franklin Roosevelt took office, the law required the United States Treasury to deliver a certain statutorily fixed amount of gold to anyone tendering Federal Reserve notes (the paper money of the United States) for that purpose.[2] Gold coin that was legal tender and contained the statutorily fixed amount of gold was in circulation. *See Rudolph v. Steinhardt*, 721 F.2d 1324, 1325 (11th Cir. 1983). Likewise, debt instruments often contained "gold clauses". Some such clauses gave the obligee the option between legal-tender currency or a certain contractually fixed amount of bullion. *See, e.g., Holyoke Water Power Co. v. American Writing Paper Co.*, 300 U.S. 324, 333 (1937). Others, like the ones here at issue, called for payment of a certain amount of "gold coin".

All of this changed when, to address the economic turmoil occasioned by the Great Depression, a series of measures in 1933 and 1934 drastically reduced the role of gold in the monetary system of the United States.[3] One of these measures rendered gold clauses unenforceable. In 1933, Congress determined that such clauses "interfere[d] with the power of Congress to regulate the value of the money of the United States" and its "authority to control [the United States'] gold resources". S. Rep. No. 99, 73d Cong., 1st

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[2] *See* Gold Standard Act of 1900, ch. 41, § 2, 31 Stat. 45 (formerly codified at 31 U.S.C. § 468). Until 1934, one dollar was worth 25.8 grains of 9/10 fine gold. *See Rudolph v. Steinhardt*, 721 F.2d 1324, 1325, 1326 & n.7 (11th Cir. 1983). In other words, the price of one troy ounce of pure gold was $20.67. *Id.* at 1325.

[3] These included measures suspending payments in gold coin, bullion, or gold certificate; making it unlawful to own gold in the United States; and requiring all gold coin to be surrendered to the Treasury so that it could be melted down into bullion. *See generally* Kenneth W. Dam, *From the Gold Clause Cases to the Gold Commission: A Half Century of American Monetary Law*, 50 U. Chi. L. Rev. 504, 509-10, 514 (1983).

Sess. 1 (1933). Congress therefore adopted a Joint Resolution declaring gold clauses to be unenforceable, § 1 of which provided:

> "[E]very provision contained in or made with respect to any obligation which purports to give the obligee a right to require payment in gold or a particular kind of coin or currency, or in an amount in money of the United States measured thereby, is declared to be against public policy; and no such provision shall be contained in or made with respect to any obligation hereafter incurred. Every obligation, heretofore or hereafter incurred, whether or not any such provision is contained therein or made with respect thereto, shall be discharged upon payment, dollar for dollar, in any coin or currency which at the time of payment is legal tender for public and private debts."

H.R.J. Res. 192, 73d Cong., 1st Sess., 48 Stat. 112, 113 (1933) (formerly codified at 31 U.S.C. § 463).[4]

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[4] The Resolution's preamble stated:

> "Whereas the holding of or dealing in gold affect[s] the public interest, and [is] therefore subject to proper regulation and restriction; and
>
> "Whereas the existing emergency has disclosed that provisions of obligations which purport to give the obligee a right to require payment in gold or a particular kind of coin or currency of the United States, or in an amount in money of the United States measured thereby, obstruct the power of the Congress to regulate the value of the money of the United States, and are inconsistent with the declared policy of the Congress to maintain at all times the equal power of every dollar, coined or issued by the United States, in the markets and in the payment of debts."

48 Stat. 112 (1933).

The 1970s brought a more permissive attitude towards the role of gold in the economy.[5] As part of this trend, Congress enacted a statute in October 1977 providing:

> "The joint resolution entitled 'Joint Resolution to assure uniform value to the coins and currencies of the United States', approved June 5, 1933 (31 U.S.C. 463), shall not apply to obligations issued on or after the date of enactment of this section."

Pub. L. No. 95-147, 91 Stat. 1227, 1229 (1977) (formerly codified at 31 U.S.C. § 463). Thus, in 1977, it once again became possible to issue obligations containing enforceable gold clauses. But the 1977 amendment did not affect obligations issued prior to its enactment. Pre-1977 gold clauses remained unenforceable by virtue of the 1933 statute. As explained by Senator Helms, a sponsor of the 1977 amendment, that amendment "make[s] enforceable[] gold clause contracts entered into *after* [its] enactment . . . . *It is intended to stand neutral with regard to the enforceability of gold clause obligations issued in the past.*" 123 Cong. Rec. 633, 635 (1977) (emphasis added).

In a 1982 recodification of Title 31 of the United States Code, Congress slightly reworded the 1933 statute and its 1977 amendment:

> "An obligation issued containing a gold clause or governed by a gold clause is discharged on payment (dollar for dollar) in United States coin or currency that is legal tender at the time of payment. This paragraph

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[5] The more permissive trend was ushered in by a 1974 measure making private ownership of gold lawful once again. *See* Pub. L. No. 93-373, 88 Stat. 445 (1974) (formerly codified at 31 U.S.C. § 442). A previous measure, Pub. L. No. 93-110, 87 Stat. 352 (1973) (formerly codified at 31 U.S.C. § 442), authorized the President to make it lawful to own gold, but that authorization expired unused.

> does not apply to an obligation issued after October 27, 1977."

31 U.S.C. § 5118(d)(2) (1994).[6] The legislative history makes clear that no substantive changes were intended. *See* H.R. Rep. No. 651, 97th Cong., 2d Sess. 1-4 (1982) ("The purpose of the bill is to restate in comprehensive form, without substantive change, certain laws . . . related to money and finance."), *reprinted in* 1982 U.S.C.C.A.N. 1895, 1895-98.[7]

D. Proceedings Before The District Court.

On January 31, 1994, Burlington moved to dismiss or, in the alternative, for summary judgment on the ground that the 1933 statute (as recodified in 1982) rendered the Bonds' gold clauses unenforceable. The Bondholders responded that the 1933 statute did not apply for three primary reasons. *First*, the Bondholders claimed that the 1985 statute authorizing the minting of American Eagle gold coins lifted a "temporary impediment" to payment in gold, and that the Railroad

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[6] The recodified statute also defines "gold clause" as "a provision in or related to an obligation alleging to give the obligee a right to require payment in . . . gold; . . . a particular United States coin or currency; or . . . United States money measured in gold or a particular United States coin or currency." 31 U.S.C. § 5118(a)(1) (1994).

[7] Congress's more permissive attitude towards gold as a monetary instrument continued in 1985, when it authorized the minting of gold coins called American Eagles. 31 U.S.C. § 5112(h), (i) (1994). The legislative history shows that Congress thereby intended to provide an alternative to the Krugerrand, a South African gold coin seen as a symbol of apartheid. *See, e.g.*, 131 Cong. Rec. H10,528, H10,532 (daily ed. Dec. 2, 1985) (remarks of Rep. Bartlett); 131 Cong. Rec. S15,664, S15,665 (daily ed. Nov. 14, 1985) (remarks of Sen. Cranston). The legislative history further shows that Congress endowed the coins with a legal-tender face value to enhance their appeal to investors and collectors. *See, e.g.*, 131 Cong. Rec. H7,087, H7,089 (daily ed. Aug. 1, 1985) (remarks of Rep. Annunzio); 131 Cong. Rec. H4,785 (daily ed. June 24, 1985) (remarks of Rep. Annunzio).

therefore could no longer rely upon the 1933 statute in its defense. *Second*, the Bondholders claimed that the 1933 statute offended the constitution. *Third*, the Bondholders claimed that, for purposes of the 1977 amendment, various post-1977 corporate "mergers and consolidations" and the settlement of a lawsuit involving the Railroad had caused new "obligations" to be "issued", thus "reviving" the gold clauses. The Bondholders also argued that Burlington's motion should be treated as one for summary judgment because Burlington had relied on materials outside the Complaint,[8] and that, pursuant to Federal Rule of Civil Procedure 56(f), the motion should be continued so that the Bondholders could take additional discovery.[9]

Ruling from the bench, Judge Dwyer granted Burlington's motion. The district court ruled (1) that "the 1933 statute . . . survives as to all obligations issued before October 27, 1977", and that "[t]hat result is not changed by the 1977 statute nor by the 1985 enactment nor by anything else that has happened", Tr. of Proceedings Before Judge Dwyer at 23 (Apr. 11, 1994); (2) that courts before it had rejected the Bondholders' constitutional claims, and that there was "no basis on which this court could or should depart from those

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[8] Burlington relied on the Affidavit of Edmund W. Burke (Jan. 31, 1994) ("Burke Affidavit") in support of its motion. That Affidavit attached (1) each post-1977 agreement with the Bondholders as a class that was referred to in ¶ 22(a) of the Complaint, Pet. App. 29a; and (2) the settlement agreement in *Rievman v. Burlington Northern R.R.* (the "*Rievman* settlement") that was referred to in ¶ 22(b) of the Complaint, *id.*

[9] The Bondholders filed a Rule 56(f) affidavit stating that they intend to seek (1) "information . . . about defendants' complex corporate activities" and (2) "information about the benefits defendants have received from their continued reliance upon the 1933 Resolution and defendants' continuing attempts to avoid their obligations under the Gold Bonds". *See* Declaration of Camden M. Hall (Mar. 1, 1994) ¶ 4 ("Hall Decl.").

earlier holdings", *id.* at 24; (3) that the post-1977 transactions referred to in the Complaint did not cause an "obligation" to "issue" within the meaning of the 1977 amendment, *id.*; (4) that in ruling on a motion to dismiss, it was proper for it to consider the agreements attached to the Burke Affidavit that were referred to in the Complaint, *id.* at 22, 24; and (5) that, even if treated as one for summary judgment, there was no reason to continue Burlington's motion pursuant to Rule 56(f) because "[t]here ha[d] not been a sufficient showing of information of any kind which could be added to the present record which would make a difference", *id.* at 26.

E. Proceedings Before The Court Of Appeals.

The Bondholders appealed the district court's ruling to the United States Court of Appeals for the Ninth Circuit. In an opinion written by Judge Canby, the court of appeals unanimously affirmed the district court. The court of appeals properly identified the statutory framework at issue:

> "In 1933, Congress passed a Joint Resolution . . . providing that any obligation containing a gold clause 'shall be discharged upon payment, dollar for dollar, in any coin or currency which at the time of payment is legal tender for public and private debts.' The statute gave the obligor the option of paying its debts in any form of legal tender, including gold, and prevented any obligee from enforcing gold clauses in existing or future obligations. . . . In 1977, Congress amended the 1933 Statute by providing that it did 'not apply to obligations issued on or after the date of enactment of this section'". Pet. App. 6a-7a (citations omitted).

The court of appeals also properly identified the "issues presented here [as] whether the 1977 legislation revived . . . ancient gold clauses, and whether various actions of the parties have created new, post-1977 obligations payable in

gold". *Id.* 4a. The court held that the "answer to both questions is 'no'". *Id.*

The court of appeals held that "the 1933 statute and its 1977 amendment are clear on their face". *Id.* 9a. Those statutes provide that "[o]bligations payable in gold are discharged by payment in any United States legal tender, but that command does not apply to obligations issued after October 27, 1977". *Id.* The court of appeals rejected the Bondholders' "abated impediment" argument—namely, that the 1933 statute merely created an "impediment" to the payment of gold that was subsequently removed by Congress in 1985 when it authorized the minting of American Eagle gold coins—because that argument "conflicts with the plain meaning of the 1933 statute". *Id.* 10a. The 1933 statute "does not simply forbid payment in illegal tender; it affirmatively authorizes payment in any tender legal at the time of payment". *Id.* Thus, the court concluded that even if gold is legal tender after 1985, the 1933 statute allows the Railroad to discharge its pre-1977 gold obligations either in "gold coins if it wishes to" or "any [other] legal tender". *Id.*

The court of appeals then rejected the Bondholders' argument that the "sale and transfer of the bonds, as well as certain business transactions and reorganizations, such as mergers and a change in the security for the bond debt, effected a new issuance of bonds after 1977". *Id.* The court held that "bonds are 'issued' within the meaning of the 1977 amendment when they are delivered to the first holder". *Id.* 11a. The court thus distinguished an earlier Ninth Circuit case that had held that a novation of a pre-1977 real estate lease could cause an obligation to "issue" after 1977: "Whatever may be the rule regarding transfer of leases, bonds must continue to be viewed as issued on the date of first issue". *Id.* 13a (distinguishing *Fay Corp. v. BAT Holdings I, Inc.*, 646 F. Supp. 946 (W.D. Wash. 1986), *aff'd sub nom. Fay Corp. v. Frederick & Nelson Seattle, Inc.*, 896 F.2d 1227

(9th Cir. 1990) (per curiam)). Moreover, the court held that "[e]ven if novation analysis were appropriate, the circumstances surrounding the corporate transactions in this case would not meet the formal requirements for a novation". *Id.* 14a n.4.

The court of appeals also rejected the Bondholders' argument that the 1933 statute is unconstitutional: "This issue has been litigated repeatedly and resolved; Congress's abrogation of the gold clauses was constitutional". *Id.* 15a (collecting cases). Finally, the court of appeals held that the district court properly entered summary judgment for Burlington, because the Bondholders "did not demonstrate that there are any disputed issues of material fact regarding whether the Railroad's bonds were first issued in 1896 and 1921, respectively," or "that additional discovery could lead to evidence raising a triable issue". *Id.*

Reasons for Denying the Writ

The court of appeals correctly held that the 1933 statute and its 1977 amendment (as recodified in 1982) prohibit the enforcement of gold clauses in bonds issued nearly a century ago. Those statutory provisions are clear on their face. They expressly provide that the Railroad may discharge its gold bond obligations in any legal tender. There is no split in authority. Every court that has interpreted those provisions has reached the same conclusion as the court of appeals. Moreover, this Court and other courts have upheld the provisions against virtually every imaginable constitutional challenge. Further review is simply unnecessary.

The Bondholders do not argue that this case is worthy of *certiorari* under the criteria set forth in Supreme Court Rule 10. *See* Sup. Ct. R. 10 ("compelling reasons" for granting *certiorari* include conflict among the courts and importance of unresolved Federal question). Rather, they argue that the court of appeals erred when it rejected each of

their "novel" statutory and constitutional arguments. Pet. 8-13. The court of appeals, however, properly held that each such argument was without merit. The Bondholders' arguments are contrary to the plain language of the statutory provisions at issue and this Court's longstanding precedents. There is no reason to disregard that plain language or to reevaluate those precedents.

Even if the Bondholders' tortured construction of the statutes at issue had some merit, this Court should nonetheless deny *certiorari*. The Bondholders argue, at bottom, that the 1977 amendment applies to the particular facts of this case, thus entitling them either to enforce the ancient gold clause obligations or, at a minimum, to conduct additional discovery. Pet. 13-20. But *certiorari* is reserved for cases of consequence to other litigants in other situations. A case is simply not worthy of *certiorari* because of its "unique facts". Even if it were, the court of appeals correctly held that there is nothing about the facts alleged by the Bondholders that renders the gold clauses enforceable.

I. THE STATUTORY PROVISIONS AT ISSUE ARE CLEAR ON THEIR FACE.

The statutory provisions at issue are unambiguous and therefore do not merit this Court's review. The court of appeals correctly held that the 1933 statute and its 1977 amendment (as recodified in 1982) are "clear on their face". Pet. App. 9a. The 1933 statute expressly states that obligations payable in gold "*shall be discharged* upon payment . . . in *any* coin or currency which at the time of payment is legal tender". 48 Stat. 112, 113 (1933) (emphasis added). The 1977 amendment removed that command for "obligation[s] issued on or after the date of [its] enactment". 91 Stat. 1227, 1229 (1977). The 1982 recodification, which was not intended to effect any substantive changes, is equally clear that obligations containing a gold clause issued prior to the 1977 amendment shall be "discharged on payment . . . in

United States coin or currency that is legal tender at the time of payment". 31 U.S.C. § 5118(d)(2) (1994). There is no dispute that the Bonds were "issued before 1933". Pet. 2. Thus, the statutory provisions at issue here render the gold clauses unenforceable by expressly granting the Railroad the right to discharge its gold bond obligations in any legal tender.

II. THERE IS NO SPLIT AMONG THE COURTS CONCERNING THE APPLICATION OF THE STATUTORY PROVISIONS AT ISSUE.

The decision of the court of appeals is in line with all other decisions addressing the enforceability of gold clauses within bonds. Upon passage of the 1977 amendment, class action lawyers filed suits on behalf of bondholders across the country seeking to enforce ancient gold clause obligations. Courts have dismissed those suits without exception on the ground that the 1977 amendment does not affect the application of the 1933 statute to preexisting gold bonds. *See, e.g., Gold Bondholders Protective Council v. Atchison, Topeka & Santa Fe Ry.*, 649 P.2d 947 (Ala. 1982); *Schickler v. Santa Fe S. Pac. Corp.*, 593 N.E.2d 961 (Ill. App. Ct. 1992). Indeed, almost immediately after passage of the 1977 amendment, one of the gold clauses at issue in this very case was held unenforceable under the 1933 statute. *See Feldman v. Great N. Ry. Co.*, 428 F. Supp. 979 (S.D.N.Y. 1977). Because the court of appeals' decision is consistent with all other relevant precedent, there is no need for further review.

III. THIS CASE DOES NOT PRESENT AN UNRESOLVED CONSTITUTIONAL ISSUE.

The 1933 statute has been upheld against virtually every conceivable constitutional challenge. Courts, including this one, have held that in enacting the 1933 statute, Congress acted well within the scope of its constitutional powers, *see*,

e.g., *Norman v. Baltimore & O.R.*, 294 U.S. 240, 302-11 (1935); that the 1933 statute in no way violates the Fifth Amendment, *see, e.g.*, *Guaranty Trust Co. of N.Y. v. Henwood*, 307 U.S. 247, 259 (1939); *Holyoke*, 300 U.S. at 340; *Gold Bondholders*, 649 P.2d at 950; and that the 1933 statute did not become unlawful when the economic emergency of the 1930s abated, *see Southern Capital Corp. v. Southern Pac. Co.*, 568 F.2d 590, 591-92 (8th Cir.), *cert. denied*, 436 U.S. 927 (1978); *Feldman*, 428 F. Supp. at 982; *Equitable Life Assurance Soc'y of N.Y. v. Grosvenor*, 426 F. Supp. 67, 73 (W.D. Tenn. 1976), *aff'd*, 582 F.2d 1279 (6th Cir. 1978), *cert. denied*, 439 U.S. 1116 (1979); *Schickler*, 593 N.E.2d at 964-65. In light of this line of precedent, the Bondholders cannot plausibly contend that their claim presents an unresolved constitutional issue.

IV. THE BONDHOLDERS' STATUTORY AND CONSTITUTIONAL ARGUMENTS ARE WITHOUT MERIT.

A. The Bondholders' "Abated Impediment" Argument Conflicts With The Plain Language Of The Statute.

The Bondholders argued below, and now argue to this Court, that when Congress authorized the minting of so-called American Eagle gold coins in 1985, 31 U.S.C. § 5112(h), (i) (1994), it removed the "impediment" to the payment of gold created by the 1933 statute, thereby reviving all gold clause obligations. The court of appeals correctly held that the Bondholders' argument "conflicts with the plain meaning of the 1933 statute". Pet. App. 10a. The reason that, after June 5, 1933, the Bondholders as a class were no longer entitled to payment in gold is not that the 1933 statute made the payment of gold coins illegal or impossible. Rather, that statute (in both its original and recodified version) by its own terms rendered gold clauses "unenforceable" by making obligations governed by such a clause "dischargeable in . . . United States

legal tender". *Guaranty Trust Co.*, 307 U.S. at 258.[10] Thus, under the 1933 statute (as recodified), the Railroad has an affirmative, statutory right to discharge its gold bond obligations in *any* legal tender. *See* 31 U.S.C. § 5118(d)(2) (1994) (gold-clause obligation "is discharged on payment (dollar for dollar) in United States coin or currency that is legal tender"); 48 Stat. 112, 113 (1933) (gold-clause obligation "shall be discharged upon payment, dollar for dollar, in any coin or currency which . . . is legal tender").

The Railroad's statutory right to discharge the Bonds in any legal tender was not altered when Congress authorized the minting of American Eagle gold coins. The 1933 statute does not specify that a gold-clause obligor must use a particular kind of legal tender to obtain discharge, and it certainly does not say that gold-clause obligors must use gold coin if lawfully available. The 1933 statute allows gold-clause obligors to obtain discharge with any of the various payment media that have legal-tender status. The only significance here of the 1985 statute was to add American Eagles to the kinds of payment gold-clause obligors can use to discharge their obligations. As the court of appeals held, "[t]he effect of the 1985 statute is to permit the [Railroad] to make payment in gold coins if it wishes to, but its debts are discharged if it pays in any legal tender. Section 5118(d)(2) so states". Pet. App. 10a.[11]

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[10] *See also Feldman*, 428 F. Supp. at 982; *Gold Bondholders*, 649 P.2d at 949; *Schickler*, 593 N.E.2d at 967.

[11] The Bondholders also suggest that the 1985 statute by implication repealed the 1933 statute. Pet. 10-11. However, the Bondholders concede that repeals by implication will not be found unless statutes are "irreconcilable", *id.* at 10-11, and they never explain why the 1985 statute is irreconcilable with the 1933 statute. Gold coins' legal-tender status is in no way inconsistent with gold-clause obligors' statutory right to discharge their obligations in legal tender, be it regular money or gold coin.

The Bondholders rely upon *Trebilcock v. Wilson*, 79 U.S. (12 Wall.) 687 (1871) (cited in Pet. 9), but that case is inapposite. In *Trebilcock*, this Court interpreted a Civil War statute making United States notes "a legal tender in payment of *all debts*". Act of Feb. 25, 1862, ch. 41, § 1, 12 Stat. 345 (emphasis added). An obligor on a note requiring payment "in specie" argued that, in light of the 1862 statute, he could discharge that note by paying United States notes. This Court disagreed, holding that (1) the note's words "in specie" meant "in gold or silver coin", 79 U.S. at 695, and (2) the statute's words "debts" included obligations "payable in money generally", but not obligations payable in gold coin, *id.* at 697. Unlike the 1933 statute, the statute there in question did not authorize "in specie" obligations to be satisfied by legal-tender other than gold coin. Moreover, the 1862 statute only applied to the discharge of "debts", which was held not to include obligations to pay in gold. Thus, *Trebilcock* is not on point because the 1933 statute (as recodified) expressly applies to obligations to pay in gold ("gold clause[s]") and expressly authorizes their discharge in "any . . . legal tender".[12]

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[12] The Bondholders attempt to obfuscate the clear holdings of *Trebilcock* by suggesting that the 1862 statute provided for discharge of gold-clause obligations upon the payment of legal tender, Pet. 9, and that the Court held for the obligee because, "despite the existence of two forms of legal tender, the parties' agreement expressly provided for the method of payment: gold", *id.* This argument is a transparent attempt at verbal legerdemain. In *Trebilock*, this Court held that obligations to pay in gold were not encompassed within the term "debts" as used in the 1862 statute. It certainly did not hold that where a statute explicitly makes gold-clause obligations dischargeable upon payment of legal tender, payment in gold coin is required nonetheless.

B. The Bondholders' Constitutional Theories Are Baseless.

The Bondholders argue that the 1985 statute authorizing the minting of American Eagle gold coins somehow made the 1933 statute unconstitutional, saying that "[i]f gold is not legal tender, [then] it is a commodity", Pet. 11, and, if that is so, then Congress lacks "authority to regulate [its] use and value", *id.* This assertion is both circular and wrong. The 1933 statute, together with other measures, aimed to curtail gold's monetary role. If that step helped to, as the Bondholders put it, reduce gold to a "commodity", that means that Congress was successful in exercising its authority over the monetary system—not that it lacked authority for its actions. *See Norman*, 294 U.S. at 302-06 (holding Congress acted within its authority over the monetary system when enacting the 1933 statute). At any rate, the Bondholders never explain how it is that Congress stands powerless to regulate the use and value of commodities. The Commerce Clause explicitly authorizes Congress to regulate interstate commerce, U.S. Const. art. I, § 8, cl. 3, and Congress has often regulated the use and value of commodities. *See, e.g.*, Commodity Exchange Act, 7 U.S.C. §§ 1-26 (1994).[13]

The Bondholders also argue that a continued refusal to enforce pre-1977 gold clauses lacks a "rational basis" after gold again became legal tender. The argument fails. When Congress enacted the 1977 amendment, gold-clause

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[13] The Bondholders further assert (again without explanation) that "[t]he enactment of the 1985 Statute also supports a declaration of unconstitutionality of the 1933 Resolution under the 'changed circumstances' doctrine recognized in *Chastleton Corp. v. Sinclair*, 264 U.S. 543 (1924)". Pet. 11. That argument has no support. This Court and other courts have held that the constitutionality of the 1933 statute does not depend upon a particular set of facts or circumstances existing at the time of its passage. *See Norman*, 294 U.S. at 302-06; *Schickler*, 593 N.E.2d at 964.

obligations of hundreds of millions of dollars in face amount were still outstanding. *See Feldman*, 428 F. Supp. at 986 & n.17. "Reviving" those gold clauses, causing already vast obligations to multiply exponentially in value, would have devastating consequences for gold-clause obligors, perhaps to the point of reducing entire industries (including the railroad industry) to financial disarray. As one court stated:

> "Clearly, the potential economic impact that would result from reviving gold clauses previously abrogated in 1933 would on its face provide a rational basis for application of the [1933 statute] retrospectively to gold clauses in existence prior to 1977."

Schickler, 593 N.E.2d at 966; *cf. Feldman*, 428 F. Supp. at 986 & n.17 (noting that "serious consequences" would have resulted from revival).[14]

C. The 1977 Amendment Does Not Apply Because The Bonds Were "Issued" Before The Amendment Was Enacted.

The Bondholders argue that the gold bonds were "issued" after October 27, 1977, within the meaning of the 1977 amendment. The court of appeals, however, correctly held that, as a matter of law, bonds are "'issued' within the

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[14] Congress surely would be justified in assuming that most of the investors holding gold bonds issued before 1977 purchased them after 1933, and thus never bargained for, relied upon, or gave value for a gold clause. To revive the gold clauses in such bonds therefore would compensate parties that were never injured. It seems not only rational but eminently just that Congress has declined to do so. Those who, after 1933, purchased bonds with gold in mind clearly acted at their own peril. *See, e.g., The Gold Bonanza That's Up to the Courts*, Bus. Wk., Jan. 12, 1976, at 66 (saying possibility that courts might hold 1974 statute repealing prohibition of private gold ownership to have impliedly repealed 1933 statute "offers investors with a fondness for long shots a good speculative play").

meaning of the 1977 amendment when they are delivered to the first holder". Pet. App. 11a. Indeed, the word "issue" has a very definite meaning with respect to bonds. It is well established that a bond is "issued' on the date it is first delivered to someone who claims it as a debt against the corporation. *See id.* (citing 6A Fletcher Cyc. Corp. § 2688 (1989)); *Gold Bondholders*, 649 P.2d at 950-51. Thus, the "Railroad's bonds were 'issued' on the date of first issue . . . . They consequently are subject to the 1933 statute and may be paid with any legal tender". Pet. App. 14a (footnote omitted).

The Bondholders neither address the court of appeals' interpretation of the 1977 amendment nor quote the relevant language of that amendment—"obligation issued"—in their Petition. Instead, they argue that the Railroad created a "new security" through a "substituted contract or novation" when it entered certain "corporate modifications" and settled a lawsuit. Pet. 12-19. In support of that argument, the Bondholders rely primarily upon Ninth Circuit authority holding that the novation of a 1929 real estate lease revived the gold clause within the original lease. *See Fay Corp.*, 646 F. Supp. at 952-53. The court of appeals, however, properly held that the Bondholders' novation theory and *Fay* are "inapposite in the context of bond obligations". Pet. App. 12a. The gold bonds were "issued" only once, the date they were delivered to the first holder. They are not "reissued" each time a bond is traded, or when the original obligor merges with another company or undergoes a reorganization. *See Wells Fargo Bank v. Bank of Am.*, 38 Cal. Rptr. 2d 521, 528 n.5 (Cal. Ct. App. 1995) (stating that the date of "issue" should be determined based "on the legal structure of the bonds and not novation").[15]

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[15] The Bondholders also cite *Abrahamson v. Fleschner*, 568 F.2d 862 (2d Cir. 1977), *cert. denied sub nom. Harry Goodkin & Co. v. Abrahamson*, 436 U.S. 905, *and cert. denied*, 436 U.S. 913 (1978), and a securities law treatise for the proposition that the Bonds were "issued"

If the rule were otherwise, the 1977 amendment would be turned on its head. The express intent of that amendment is to remain "neutral" concerning bonds issued prior to 1977. *See supra* p. 5. Under the Bondholders' novation theory, however, those bonds would become payable in gold whenever the obligor acquires new assets or alters its corporate form. The court of appeals correctly observed that the Bondholders' theory of novation would "render virtually all [pre-1977 gold bonds] payable in gold". Pet. App. 13a. Thus, the court properly refused "to accept the view that Congress intended to alter so radically the obligations of bonds that have been in public circulation for nearly a century, when the language and history of [the 1977] amendment suggest[] a contrary purpose". *Id.* 14a. Moreover, the bond market would be seriously disrupted if, as the Bondholders' argue, a corporation's obligations on its bonds were somehow altered or changed each time it underwent a corporate change.

V. THE FACTS OF THIS CASE DO NOT MAKE THE GOLD CLAUSES ENFORCEABLE.

A. Post-1977 Events Did Not Effect A Novation Of The Gold Bonds.

Even if the Bondholders' interpretation of the 1977 amendment were accepted at face value—*i.e.*, bonds may be "novated" and the novation of a gold bond causes it to "issue" under that amendment—the Bondholders are simply wrong that the Railroad effected a post-1977 novation of its gold

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after 1977. *Abrahamson* and the securities law treatise, however, address Rule 10b-5 of the 1934 Securities Exchange Act, which prohibits fraudulent activity "in connection with the *purchase* or *sale* of any security". Securities Exchange Act of 1934, 15 U.S.C. § 78(j) (1994) (emphasis added); *see Abrahamson*, 568 F.2d at 868. Neither of these authorities addresses the statutes at issue nor their operative language—"obligation issued".

bonds. The common law elements for a novation are well settled. There must be "(1) a previously valid obligation; (2) agreement of all parties to a new contract; (3) extinguishment of the old contract; and (4) a valid new contract". *Healey v. Healey*, 594 N.Y.S.2d 90, 91 (N.Y. App. Div. 1993); *see also MacPherson v. Franco*, 208 P.2d 641, 642 (Wash. 1949); 58 Am. Jur. 2d *Novation* § 13, at 619 (1989).[16] As the court of appeals concluded, the transactions identified in the Complaint did not effect a novation because "the old obligations were never extinguished", "no new obligor was substituted", and "the Railroad did not undertake any new debt obligation". Pet. App. 14a n.4.

1. The 1981 Name Change Did Not Effect A Novation.

The Bondholders point out that supplemental indentures relating to a 1981 transaction in which the Railroad changed

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[16] Novation is never presumed. *See, e.g., Beck v. Mfrs. Hanover Trust Co.*, 481 N.Y.S.2d 211, 218 (N.Y. Sup. Ct. 1984); *Trans-Orient Marine Corp. v. Star Trading & Marine, Inc.*, 736 F. Supp. 1281, 1284 (S.D.N.Y. 1990), *aff'd*, 925 F.2d 566 (2d Cir. 1991). It will be found only when a "clear and definite intention" to effect a novation exists. *See, e.g., Beck*, 481 N.Y.S.2d at 218; 58 Am. Jur. 2d *Novation* § 16, at 622-23 (1989); 22 N.Y. Jur. 2d *Contracts* § 406, at 321-22 (1982). Where, as here, "the intention of the parties to a transaction claimed to effect a novation is expressed in writing, the intention of the parties is a question of law for the court to decide". *Security Benefit Life Ins. Co. v. FDIC*, 804 F. Supp. 217, 228 (D. Kan. 1992); *see also Walker v. KFC Corp.*, 728 F.2d 1215, 1217 (9th Cir. 1984); 58 Am. Jur. 2d *Novation* § 52, at 648 (1989). Thus, contrary to the Bondholders' contentions (Pet. 16), the existence of a novation does not always (or even often) raise a question of fact. The rule that the interpretation of unambiguous contracts is a matter of law for a court applies with particular force to bond indentures because such agreements are "not the consequence of the relationship of particular borrowers and lenders and do not depend upon particularized intentions of the parties". *See Sharon Steel Corp. v. Chase Manhattan Bank, N.A.*, 691 F.2d 1039, 1048 (2d Cir. 1982), *cert. denied*, 460 U.S. 1012 (1983).

its name state that Burlington Northern Railroad Company "assume[d]" liability on the Bonds "so that . . . Burlington Northern Railroad Company shall succeed to and be substituted for Burlington Northern Inc." Pet. 17. Apparently on the theory that the addition of a new obligor and the release of an old obligor can effect a novation, *see, e.g.*, Restatement (Second) of Contracts § 280(a)(1) (1979), the Bondholders argue that the supplemental indentures reflecting the Railroad's 1981 name change resulted in a "novation", Pet. 16-17.

The Bondholders are mistaken. *First*, the supplemental indentures reflecting the 1981 name change did not add a "new" obligor. The Railroad continued to be the exact same corporate entity, having the same assets, liabilities, officers, directors, and employees. The only thing that did change, its name, is immaterial for purposes of a novation analysis.[17] *Second*, the 1981 supplemental indentures say nothing about releasing from liability a previous obligor, a necessary element for a novation where a subsequent agreement adds a new obligor.[18] *Finally*, the stated intention of the 1981

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[17] *See, e.g.*, *American Express Travel Related Servs. Co. v. Berlye*, 414 S.E.2d 499, 501 (Ga. Ct. App. 1991); *John Wanamaker N.Y., Inc. v. Comfort*, 53 F.2d 751, 753 (5th Cir.), *cert. denied*, 285 U.S. 560 (1931); *cf. Cyrix Corp. v. Intel Corp.*, 803 F. Supp. 1200, 1210 (E.D. Tex. 1992) ("[a] corporate name change does not affect the legal existence or any of the . . . obligations of the corporation"), *appeal dismissed*, 9 F.3d 978 (Fed. Cir. 1993); 48 C.F.R. §§ 42.1200-42.1205 (1993) (government-contract regulations distinguishing between novation and change-of-name agreements).

[18] *See, e.g.*, *Security Benefit*, 804 F. Supp. at 227 ("essential element of a novation is a release of all claim of liability against the original debtor"); *Wilson v. Midstate Indus., Inc.*, 777 S.W.2d 310, 312-13 (Mo. Ct. App. 1989) (addition of new debtor is not a novation unless the parties intended to release the old debtor); 22 N.Y. Jur. 2d *Contracts* § 409, at 323-24 (1982) ("An essential element of a novation is the release of the obligor from all liability on the original obligation by the extinguishment

supplemental indentures was not to create any new indebtedness, but to evidence the continued existence of an old indebtedness.[19] As a matter of law, an instrument whose stated purpose is merely to evidence previously existing debt does not effect a novation.[20]

2. The Other "Mergers and Consolidations" And The *Rievman* Settlement Did Not Effect A Novation.

Each of the "mergers or consolidations" and the *Rievman* settlement referred to in the Complaint involved the release by the trustees of certain collateral securing the Bonds, and in the case of the four "mergers or consolidations", also involved the *addition* of new collateral. The Bondholders assert that "[a] novation can result from a change in security for an indebtedness". Pet. 13. But variations in collateral do not automatically effect a novation. The rule is that "a mere change in . . . the character of the security, unless so intended by the parties, does not operate as a novation". 66 C.J.S. *Novation* § 11(b)(1), at 693 (1950) (footnote omitted). There is no special significance to variations in collateral, and the

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of the obligation, and the mere acceptance of the obligation of the third person, without such agreement or intention as to the release of the original debtor, is not sufficient to constitute a novation.") (citations omitted).

[19] The 1981 supplemental indentures, captioned "Providing for the Continuation of Obligations by Reason of the Change of Name of Burlington Northern Inc. to Burlington Northern Railroad Company", list as their purpose "to evidence" or "to record" "the change in corporate name", and refer to the obligation of payment created in the indentures as "continuing", "unbroken", and "uninterrupted". Burke Ex. C, F, K.

[20] *See, e.g., Davis v. Gutheil*, 152 P. 14, 16 (Wash. 1915) (novation requires "the substitution, not of a new paper or note, but of a new obligation in lieu of the old one"); *accord Gary-Wheaton Bank v. Burt*, 433 N.E.2d 315, 320-21 (Ill. App. Ct. 1982); 11 Am. Jur. 2d *Bills and Notes* § 59, at 84-85 (1963).

Bondholders' suggestion to the contrary finds no support whatsoever in either authority or logic.[21]

In any event, like the supplemental indentures reflecting the 1981 name change, each agreement at issue contains language that is, as a matter of law, utterly incompatible with novation. Each of the supplemental indentures reflecting the four "mergers or consolidations" stated that its purpose was merely to provide for the subjection of property of the merging or dissolving entity to the lien of the Great Northern Indenture, Burke Ex. L, M, N, O; stated that the Railroad executed the document out of a "desir[e] to comply with the provisions of the [Great Northern Indenture]", *id.*; and expressed a clear intent to leave the Great Northern Indenture intact by saying that the supplemental indentures "shall be subject to the provisions" thereof, *id.* Similarly, the *Rievman* settlement agreement said that "[n]othing contained in [the] Stipulation . . . shall affect the obligation of [the Railroad] to pay principal of and interest on the [Northern Pacific Bonds] when due", Burke Ex. P, and that "[a]ll rights, duties and obligations under the [Northern Pacific Bonds and the Northern Pacific Indentures] in effect prior to execution of

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[21] The two bankruptcy-court cases upon which the Bondholders rely, *In re Tardy*, 18 B.R. 36 (Bankr. C.D. Ill. 1982), and *Averhoff v. People Finance Co. (In re Averhoff)*, 18 B.R. 198 (Bankr. N.D. Iowa 1982), show no more than that an agreement varying collateral may effect a novation if all requirements for a novation are otherwise satisfied. *See also Ford Motor Credit Co. v. Beneficial Commercial Corp. (In re McClure)*, 108 B.R. 468, 471 (Bankr. M.D. Pa. 1989); *In re Dukes*, No. 87-830-W, 1988 WL 58009, at *3 (Bankr. S.D. Iowa Feb. 29, 1988); *Liberty Sav. & Loan Ass'n v. Greenberg (In re Greenberg)*, 81 B.R. 662, 665 (Bankr. M.D. Fla. 1987). The Bondholders also rely on a passage in 58 Am. Jur. 2d *Novation* § 40, at 640-41 (1989), but that passage relies solely on cases like *Averhoff* and *Tardy*, and itself cautions that "[e]ach case must be judged on its own particular circumstances", *id.* at 641.

[the] Stipulation . . . shall remain in full force and effect except to the extent provided by [the] Stipulation", *id.*[22]

3. The New Transactions Identified By The Bondholders Are Not Part Of The Record And Did Not Effect A Novation.

For the first time in this litigation, the Bondholders identify in their Petition a series of new transactions they claim resulted in novations. Pet. 16 (citing Pet. App. G). Those transactions do not meet the Complaint's own description of events that may cause gold bonds to revive (Pet. App. 28a-29a (describing transactions in which Railroad "undertook new obligations under the Gold Bonds")), and the facts relating to those transactions are not part of the record below. Thus, the new transactions cannot be a ground for granting *certiorari*.

Moreover, the transactions identified by the Bondholders could not have effected a novation of the Bonds because none of those transactions resulted in an agreement between the Railroad and the Bondholders as a class. *See* 66 C.J.S. *Novation* § 3(b), at 684 (1950) ("a novation is itself a contract; it is a new contract creating new contractual relations") (footnote omitted); *id.* § 11(a), at 691 ("a novation exists only by reason of an agreement"); *Walker*, 728 F.2d at 1217 ("[t]o constitute a novation . . . it is necessary that there be a new contract"). Indeed, those transactions fail even the Bondholders' misguided novation test because they did not

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[22] This "full force and effect" language alone conclusively defeats the notion of a novation. *See, e.g.*, *Polk Chevrolet, Inc. v. Vicaro*, 162 So.2d 761, 765 (La. Ct. App. 1964) (no novation where subsequent agreement provided that terms of original agreement would "remain in full force and effect"); *Mountainview Realty Assocs. v. Stark*, 593 N.Y.S.2d 800, 801 (N.Y. App. Div. 1993) (same); *Melat v. Melat*, 602 A.2d 380, 385 (Pa. Super. Ct. 1992) (same); *Pioneer Credit Corp. v. Carden*, 245 A.2d 891, 895 (Vt. 1968) (same).

change the corporate identity of the Railroad or affect the security for the bonds.

B. Burlington Was Entitled To Summary Judgment.

The Bondholders argue that Judge Dwyer of the district court should have continued Burlington's motion to dismiss, or, in the alternative, for summary judgment under Federal Rule of Civil Procedure 56(f). Judge Dwyer, however, did not abuse his discretion, the applicable standard on this point, in holding that the Bondholders had failed to meet the requirements of Rule 56(f), and the court of appeals did not err in affirming that ruling. The Ninth Circuit and other circuits are in agreement that a Rule 56(f) affidavit does not preclude summary judgment unless it (1) identifies the particular facts sought and (2) demonstrates that those specifically identified facts will raise an issue of material fact so as to defeat summary judgment.[23]

The Bondholders failed to satisfy either requirement. *First*, the Bondholders' filed a Rule 56(f) affidavit that says that they intend to seek "information . . . about defendants' complex corporate activities". Hall Decl. ¶ 4.[24] Language so

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[23] *See, e.g., Berkeley v. Home Ins. Co.*, 68 F.3d 1409, 1414-15 (D.C. Cir. 1995), *cert. denied*, 116 S. Ct. 1825 (1996); *Morrissey v. Boston Five Cents Sav. Bank*, 54 F.3d 27, 35 (1st Cir. 1995); *Sage Realty Corp. v. Insurance Co. of N. Am.*, 34 F.3d 124, 128 (2d Cir. 1994); *Dowling v. City of Philadelphia*, 855 F.2d 136, 139-40 (3d Cir. 1988); *Temkin v. Frederick County Comm'rs*, 945 F.2d 716, 724-5 (4th Cir. 1991), *cert. denied*, 502 U.S. 1095 (1992); *Krim v. BancTexas Group, Inc.*, 989 F.2d 1435, 144-42 (5th Cir. 1993); *Emmons v. McLaughlin*, 874 F.2d 351, 357 (6th Cir. 1989); *Harris v. Duty Free Shoppers Ltd. Partnership*, 940 F.2d 1272, 1276 (9th Cir 1991); *Pasternak v. Lear Petroleum Explorations, Inc.*, 790 F.2d 828, 832-33 (10th Cir. 1986).

[24] The Rule 56(f) affidavit also states that the Bondholders intend to seek "information about the benefits defendants have received from their continued reliance upon the 1933 Resolution and defendants'

vague flunks the specificity test of Rule 56(f). *Second*, the information that the Bondholders sought is legally irrelevant and thus would not elicit evidence that could raise genuine issues of material fact. Because the Bonds were "issued" within the meaning of the 1977 amendment only when they were first delivered, *see supra* pp. 17-19, the information identified in the Bondholders' Rule 56(f) affidavit could not change the conclusion that the Bonds were issued prior to 1977 and thus are unenforceable under the 1933 statute (as recodified). Moreover, even if the Bondholders' novation analysis were applicable, the Rule 56(f) affidavit clearly refers to something other than agreements between Burlington and the Bondholders as a class. Such information is relevant only if the Bondholders' theory that there can be a novation without a new agreement is correct. Because it is not, *see supra* pp. 24-25, that information could not possibly defeat summary judgment.

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continuing attempts to avoid their obligations under the Gold Bonds". Hall Decl. ¶ 4. That information apparently relates to the Bondholders' unjust enrichment claim, which has not been raised as a ground for *certiorari*.

Conclusion

For the foregoing reasons, the petition for a writ of *certiorari* should be denied.

Respectfully submitted,

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